(2)

No. 87-1576

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

KAMLESHWAR UPADHYA,

Petitioner,

v.

DONALD N. LANGENBERG, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Seventh Circuit properly hold that Petitioner Upadhya's unilateral expectation of continued employment by the University of Illinois for five years as an untenured assistant professor was insufficient to create a property interest in continued employment for five years because his expectation was unsupported by a promise of employment for five years by the University of Illinois, contrary to state law which did not permit five year appointments of untenured assistant professors, and contrary to the terms of his express one year appointments?

2. Did the Seventh Circuit properly hold that Department Head Wu did not have authority to offer Petitioner Upadhya employment for five years because state law did not permit appointments of untenured assistant professors for terms of more than two years?

3. Did the Seventh Circuit properly hold that, to the extent the district court found that the University of Illinois promised Petitioner Upadhya he would be employed for a five year term and would not be dismissed before five years were up, the district court's findings were not supported by the record evidence and were clearly erroneous?

4. Did the Seventh Circuit properly refuse to hold that Petitioner Upadhya could acquire a property interest in continued employment for five years through purported department practices which would be contrary to the University of Illinois' formal tenure system, contrary to state law and contrary to the terms of his express one year appointments?

TABLE OF CONTENTS

	PAGE(S)
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
PROVISIONS OF STATE REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	11
A. The Seventh Circuit's Opinion in this Case Is Consistent with Well Settled and Uniform Law of this Court and the Courts of Appeals	11
B. The Seventh Circuit's Decision Does Not Conflict with any Other Circuit Court of Appeals Decision	13
C. The Seventh Circuit's Decision Is Consistent with Other Seventh Circuit Decisions	15
D. The Seventh Circuit Properly Held that Upadhya Had No Legitimate Claim to Continued Employment under State Law	17
E. Upadhya Had No Legitimate Claim to Continued Employment under State Law for Additional Reasons the Seventh Circuit Did Not Need to Reach	18

F. The Seventh Circuit Properly Held that Department Head Wu Lacked Authority to Promise Upadhya Employment for Five Years under the University's *Statutes* .. 20

G. The Seventh Circuit Properly Held Certain Factual Findings Were Without Record Support and Were Clearly Erroneous ... 21

H. The Seventh Circuit Properly Refused to Hold that Upadhya Could Acquire a Property Interest through Purported Department Practices 21

CONCLUSION 22

SUPPLEMENTAL APPENDIX

Excerpts from *University of Illinois Statutes* ... S.A. 1-4

TABLE OF AUTHORITIES

Cases	PAGE(S)
Anderson v. Bd. of Trustees of Community College District No. 526, County of Sangamon, 56 Ill. App. 3d 937, 372 N.E.2d 718 (4th Dist. 1978)	19
Anderson v. Bessemer City, 470 U.S. 564 (1985)	21
Bachewicz v. American National Bank & Trust Co., 126 Ill. App. 3d 298, 466 N.E.2d 1096 (1st Dist. 1984)	19
Baden v. Koch, 638 F.2d 486 (2d Cir. 1980)	14
Bishop v. Wood, 426 U.S. 341 (1976)	12
Board of Regents v. Roth, 408 U.S. 564 (1972)	11, 12
Burnidge Bros. Almora Heights, Inc. v. Weise, 142 Ill. App. 3d 486, 491 N.E.2d 841 (2d Dist. 1986)	20
Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981)	11
Evans v. Benjamin School District No. 25, 134 Ill. App. 3d 875, 480 N.E.2d 1380 (2nd Dist. 1985)	19
Golen v. Chamberlain Mfg. Corp., 139 Ill. App. 3d 53, 487 N.E.2d 121 (1st Dist. 1985)	18
Harris v. Arizona Bd. of Regents, 528 F. Supp. 987 (D. Ariz. 1981)	13
In re *Estate of Milborn*, 122 Ill. App. 3d 688, 461 N.E.2d 1075 (3d Dist. 1984)	17
International Administrators, Inc. v. Life Ins. Co. of North America, 753 F.2d 1373 (7th Cir. 1985)	19

Jago v. Van Curen, 454 U.S. 14 (1981) 11

Ladesic v. Servomation Corp., 140 Ill. App. 3d 489, 488 N.E.2d 1355 (1st Dist. 1986) 17

Levin v. Civil Service Comm'n., 52 Ill. 2d 516, 288 N.E.2d 97 (1972) 20

Lovelace v. Southeastern Massachusetts University, 793 F.2d 419 (1st Cir. 1986) 14

McElearney v. University of Illinois, 612 F.2d 285 (7th Cir. 1979) 15-16

Medina v. Spotnail, Inc., 591 F. Supp. 190 (N.D. Ill. 1984) 18

Metromedia, Inc. v. Kramer, 152 Ill. App. 3d 459, 504 N.E.2d 884 (1st Dist. 1987) 20

O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (1980) 11

Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 (7th Cir. 1985) 17

People ex rel. Board of Trustees of the University of Illinois v. Barrett, 382 Ill. 321, 46 N.E.2d 951 (1943) 16

Perry v. Sindermann, 408 U.S. 593 (1972) 12, 21

Pudil v. Smart Buy, Inc., 607 F. Supp. 440 (N.D. Ill. 1985) 17

Rakowski v. Lucente, 104 Ill. 2d 317, 472 N.E.2d 791 (1984) 19

Rend Lake College Fed. of Teachers Local 3708 v. Bd. of Community College, Dist. No. 521, 84 Ill. App. 3d 308, 405 N.E.2d 364 (5th Dist. 1980) 18

Smith v. Bd. of Education, 708 F.2d 258 (7th Cir. 1983) 12

Soni v. Bd. of Trustees of the University of Tennessee, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976) 13

Titchener v. Avery Coonley School, 39 Ill. App. 3d 871, 350 N.E.2d 502 (2d Dist. 1976) 17

Vail v. Bd. of Education, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984) 15-16, 20

Weinstein v. University of Illinois, 628 F. Supp. 862 (N.D. Ill. 1986), *aff'd*, 811 F.2d 1091 (7th Cir. 1987) 16

White v. Mississippi State Oil & Gas Board, 650 F.2d 540 (5th Cir. 1981) 14

Wright v. Cayan, 817 F.2d 999 (2d Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S. Ct. 157 (1987) . 14

Constitutional Provisions
Statutes and State Regulations

Fourteenth Amendment to the U.S. Constitution .. 2, 12

42 U.S.C. §1983 2

The *University of Illinois Statutes* ..... *passim*

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PROVISIONS OF STATE REGULATIONS INVOLVED

Excerpts from the *University of Illinois Statutes*, which are administrative rules having the force of law in Illinois (A. 2), are reprinted in the Supplemental Appendix hereto. (S.A. 1-3).

STATEMENT OF THE CASE[1]

The University of Illinois (the "University") hired Kamleshwar Upadhya ("Upadhya") in 1984 as an untenured Assistant Professor of Engineering. He was appointed to the tenure track, with a tenure decision to be made no later than fall, 1988, the beginning of his fifth year. (A. 1). After evaluating him in June, 1986, the University decided not to renew Upadhya's contract and offered him a terminal appointment, expiring on August 31, 1987. (A. 1-2).

Upadhya then filed this suit, claiming that he had a property interest in continued employment for a full five years on the tenure track to demonstrate his professional skills prior to his being considered for tenure. He contended that his discharge (effective after only his third year of employment on the tenure track) violated the due process clause of the Fourteenth Amendment and 42 U.S.C. §1983. (A. 1-2).

The *University of Illinois Statutes* (the "*Statutes*") set forth the rules governing probationary tenure track appointments such as Upadhya's appointments. The *Statutes* are bylaws having the force of administrative rules and, hence, law in Illinois. (A. 2). In relevant part, the *Statutes* limit appointments at the rank of assistant professor to no longer than two years and limit extensions to those expressly approved by the President or Board of Trustees of the University. (Article X, Sec. 1a and 1a(2)). (A. 2-3; S.A. 2). The *Statutes* provide that appointees who receive

[1] The Statement of the Case in Petitioner's Brief contains many mistakes, misstatements and mischaracterizations. Therefore, Respondents provide this counterstatement of the case.

first contracts at the University as assistant professors enter a probationary period of seven calendar years of service, *i.e.*, the "tenure track". Credit for prior academic services can be received for up to three years. (Article X, Sec. 1b(1)). (A. 5; S.A. 2-3). The *Statutes* specifically permit notice of non-reappointment to be given at any time before the last year of the probationary period (Article X, Sec. 1b(4)), and preclude any reasonable expectation of renewal, specifically providing that there is no "guaranty" of renewal even if the appointee is performing the job satisfactorily. (Article X, Sec. 1b(6)). (A. 3; S.A. 3-4).

Notwithstanding the contrary provisions of the *Statutes*, Upadhya claimed entitlement to employment for five years commencing with his initial appointment based on his understanding of statements made to him during the negotiations leading to his appointment. (A. 2). The district court found that the professors who recruited him promised him five years to prove himself before he would be considered for tenure, which the district court concluded was sufficient to create a property interest in continued employment for the five years, notwithstanding the contrary provisions of the *Statutes*. (A. 3).[2]

The Seventh Circuit Court of Appeals reversed. The Seventh Circuit held that Upadhya's belief that he would

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[2] The district court ordered the University to continue Upadhya's employment indefinitely until it had afforded him due process with relation to his termination. (A. 2). As noted by the Seventh Circuit in reversing the district court's judgment, the district court's injunction did not distinguish between the untenured, five years of employment claimed by Upadhya, and an indefinite, untenured appointment *not* claimed by Upadhya. As such, the district court improperly granted Upadhya more relief than that to which even he claimed entitlement. (A. 2).

be employed for five years was a unilateral expectation which was not backed up by a promise by the University to employ him for five years. Upadhya did not obtain an express promise that five years would be his minimum term. Any implication to that effect was unauthorized by the President and Board of Trustees—the only persons who could bind the University to such contracts. As such, Upadhya had no legitimate claim of entitlement to, nor property interest in continued employment for five years. (A. 7, 9-10).

As to the district court's factual findings, the Seventh Circuit concluded that, to the extent the district court found that Upadhya expected to have five years to raise money and conduct research before he would be considered for tenure, the district court's findings accorded with the evidence. However, the Seventh Circuit held that, to the extent the district court found that the University promised Upadhya he would have a five year term of employment and would not be dismissed before the five years were up, the district court's findings were not supported by the record evidence and were clearly erroneous. (A. 8-9).

In reaching these conclusions, the Seventh Circuit carefully reviewed the writings between the parties. (A. 3). The first writing was a letter dated July 30, 1984, from Respondent Chien H. Wu ("Wu"), Head of the University's Department of Civil Engineering, Mechanics and Metallurgy ("CEMM"). (A. 3). The letter, written after the faculty of the Department had interviewed Upadhya and recommended his appointment, stated (emphasis added by Seventh Circuit):

> On behalf of the department and with the concurrence of the Dean, I am happy to be able to offer you a tenure-track assistant professorship with an initial salary of . . . for the nine-month academic year.

> A summer appointment of two-ninths of your academic salary, which requires you to teach one course during the eight-week summer quarter, is guaranteed for the first summer.
>
> A tenure code of A2 must be assigned to your appointment to recognize your previous experience. This means that a recommendation for promotion or termination must be submitted by the department *no later than the beginning of your fifth year* of service on Campus. For a favorable recommendation, however, it will be necessary for you to demonstrate your ability to conduct independent research and to attract outside sponsorship.
>
> . . . I hope very much that you will find our offer acceptable. You may indicate that fact by signing the enclosed copy of this letter and returning it to me as soon as possible so that we may proceed to resolve the other formalities.

(A. 3-4). The "other formalities" included securing the approval of the University's Board of Trustees. (A. 4).

Upadhya signed the copy of the letter and moved to Chicago. (A. 4). He found waiting a "Notification of Appointment," dated August 29, 1984, which stated in part:

> By authority of The Board of Trustees of the University of Illinois, you have been appointed to the following position(s) in the University: Assistant Professor of Metallurgical Engineering-Engineering, Civil, Mechanical and Metallurgy . . . Tenure Code 2 . . . Percent time 100 . . . Period of service Academic year 1984-85 . . . Period of payment from 09/01/84 through 08/31/85 . . . This appointment is made subject to all applicable laws and to the *University of Illinois Statutes* . . . . Please indicate your action (acceptance or declination of this appointment) on the attached copy and return it . . . . Delay in returning the acceptance may result in delay in payment of salary.

(A. 4-5). Upadhya promptly signed and returned the attached copy and took up his duties. (A. 5). Upadhya received a similar notification in September 1985 appointing him to service for "ACAD YEAR 1985-86" with a tenure code of 3. (A. 5).

Each year the notification included the statement: "When a number appears in the Tenure Code column it indicates the number of years which will be credited at the end of this appointment period toward the completion of the [seven-year] probationary period identified in Article X, Section 1 of the *University of Illinois Statutes*." (A. 5). Each notification also stated that it was made "subject to all applicable laws and to the *University of Illinois Statutes*. . . ," and that "[c]ertain terms of employment . . . appear . . . in the enclosed document." (A. 5). A two-page extract of the *Statutes* pertinent to the terms of employment was included with all such notifications. (A. 5). The district court found that Upadhya did not read the notifications of appointment, received no extracts, and did not obtain the readily available *Statutes* from any other source, despite the notifications' warnings. (A. 5).

The Seventh Circuit concluded that the three written documents (the Wu letter and the two notifications), read in conjunction with the *Statutes*, showed that the University was offering Upadhya a series of year-to-year contracts, with a limit of five before a tenure decision had to be made. (A. 5). The Seventh Circuit observed that the three writings did *not* promise him five years of employment, and that the *Statutes* made it clear that no one with whom Upadhya dealt had the authority to make such a promise. (A. 7).

The Seventh Circuit also reviewed the record testimony in search of support for Upadhya's claim and the district court's finding that agents of the University promised

Upadhya that he would have a five year term of employment. The Court found none. In particular, the Seventh Circuit dissected each of the passages of trial testimony on which Upadhya relied to support the district court's finding that the University promised five years of employment to Upadhya. The Seventh Circuit found each lacking. (A. 8-9, 12-13).

The first passage was Upadhya's testimony recounting a conversation with Respondent McNallan ("McNallan"), a metallurgist in the Department of Engineering, on June 12, 1984, the day Upadhya interviewed with the faculty and presented a paper on his initial visit to the University. (A. 8). McNallan and Upadhya had discussed the possibility of Upadhya's starting as an associate professor, which would have set two years as the maximum before a tenure decision was required. McNallan advised Upadhya to start as an assistant professor so he would have more time before a tenure decision was required. (A. 8-9). Upadhya's testimony follows:

> [Dr. McNallan said to me]: "But you can come here as an assistant or associate professor. I had a brief chat (he told) with Dr. Danyluk in the morning." In fact, he was using the word "Steve." That, "I had a brief chat with Steve [Danyluk] and we both agreed that you can—you are qualified for any position, but we both will advise you to come here as an assistant professor, because—"And he explained me himself that it will give you in fact sufficient time, in fact five years time, in order to obtain a research grant to obtain tenure. In fact then I ask him that.

(A. 8). The Seventh Circuit noted that, at best, this exchange showed that Professors McNallan and Danyluk told Upadhya he would have five years as an assistant professor to make a case for tenure, which led to Upadhya's forcefully expressed belief that: "I get five years [sic] time

in order to obtain money before they consider me for tenure." (A. 8).

The second (and final) passage of record testimony relied on by Upadhya is Upadhya's testimony describing his discussion with Department Head Wu during his initial visit to the University. (A. 10). The full passage[3] of Upadhya's testimony is:

> Q. All right. Was there any further discussion that you had with Dr. Wu during this meeting that you can recall?
>
> A. The second I think then he told, "Well, for assistant professor, you get five years to bring research money." Or—no. He told, "Before we consider you for tenure and for associate professor, we will consider you after two years."

(A. 11). As the Seventh Circuit noted, this second passage does not support Upadhya's claim because Upadhya took back the five year figure and substituted a two year period. (A. 12-13).

The Seventh Circuit concluded that neither of these passages is sufficient to support an enforceable claim to continued employment for five years. Neither statement distinguished between the maximum or outside limit for Upadhya to make a case for tenure, and the minimum years of employment guaranteed. (A. 8, 13). As the Seventh Circuit noted, being allowed more time is not the same thing as being guaranteed more time. (A. 8-9). Further, when Wu made Upadhya a written offer by letter on July 30

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[3] The Seventh Circuit noted that the full passage of Upadhya's testimony is rather different from the extract which Upadhya's counsel quoted—"You get five years." (A. 11). Upadhya's counsel continues to misquote the shorter version of this testimony out of context herein. (Upadhya's Petition for Certiorari at p. 19).

(not to mention the terms of Upadhya's appointments from the Board of Trustees and the provisions of the *Statutes*), Wu identified five years as an outer limit for Upadhya to make a case for tenure, *not* as a period of guaranteed employment. (A. 9).

Moreover, the Seventh Circuit noted that neither McNallan, Danyluk nor Wu was authorized to bind the University to a five year employment commitment. (A. 9, 13). McNallan and Danyluk had no authority to bind the University to any employment commitment. (A. 9). While Wu had actual authority to make an offer of employment, he did not have the authority to make an extended offer contrary to the *Statutes*' two year limitation on assistant professor appointments. (A. 13). Under the *Statutes*, only the President of the University and its Board of Trustees had such authority. (A. 13).

The Seventh Circuit also noted that, given the parol evidence rule, Upadhya would face hurdles in relying on even an express oral promise of employment for five years because he would be using it to vary the terms of three subsequent writings. Moreover, the Seventh Circuit noted that Illinois treats the *Statutes* as laws, which may forbid variances by subordinate officials of the state. (A. 7). Because the record did not support the district court's finding that Upadhya was promised employment for five years, the Seventh Circuit found it unnecessary to consider whether Upadhya had adequate replies to these difficulties. (A. 7-8).

The Seventh Circuit also considered the circumstances surrounding Upadhya's appointment and his beliefs and understandings of his appointment. (A. 5-6). The Seventh Circuit concluded that giving a paper, moving from one city to another, and similar activities are common among

assistant professors and do not negate the *Statutes*. (A. 7). Vague and informal statements about how long Upadhya could expect to serve before a final tenure decision was required do not translate probabilities into entitlements. (A. 7). The Seventh Circuit acknowledged that Upadhya interpreted the tenure code of 2 assigned to his initial appointment to mean that he would have five years before the University would make an up-or-out decision (A. 6), and accepted the district court's finding that Upadhya believed his appointment ran for five years and no one expressly told him otherwise. (A. 7). The Seventh Circuit also accepted the district court's finding that Upadhya did not receive or read the *Statutes* that would have disabused him of his misunderstanding, while noting that Upadhya signed his appointment which expressly incorporated the readily available *Statutes*, making them part of his contract as a matter of Illinois law. (A. 7).

The Seventh Circuit concluded that Upadhya's belief was a "unilateral expectation," not a legitimate claim of entitlement to continued employment under Illinois law, because his belief was not backed up by a promise. (A. 7, 9-10). Upadhya did not obtain an express promise that five years would be his minimum term of employment. (A. 10). Any implication to that effect was unauthorized by the President and the Board of Trustees of the University—the only persons who could bind the University to such contracts. (A. 10). Accordingly, the Seventh Circuit reversed the district court and held that Upadhya lacked a property interest in further renewal of his appointment. (A. 10).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

A. The Seventh Circuit's Opinion in this Case Is Consistent with Well Settled and Uniform Law of this Court and the Courts of Appeals

This case comes down to the simple, well-established legal proposition expressed by the Seventh Circuit in this case: "Unless unilateral expectations are enough to create a property interest, Upadhya cannot prevail." (A. 9). The Seventh Circuit applied state law to reach its conclusion that Upadhya's claims were only unilateral expectations. The Seventh Circuit's conclusion that Upadhya's unilateral expectations were not enough to create a property interest in continued employment is consistent with prior decisions of the Supreme Court, the Seventh Circuit, and the other federal circuit Courts of Appeals. There is neither confusion concerning, nor any need for clarification of the law applicable to the facts of this case.

This Court cautioned in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972): "[t]o have a property interest in a benefit, a person clearly must have more than an abstract desire or need for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." As noted by the Seventh Circuit herein, a "legitimate claim of entitlement" to continued employment means more than a high probability of renewal of an appointment. *Id.* 408 U.S. at 578 n. 16; *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463-65 (1981). It means "an expectation . . . that was legally enforceable", *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 788 n. 21 (1980), a mutually binding obligation, *Jago v. Van Curen*, 454 U.S. 14, 18-20 (1981). (A. 6).

The law is also well established that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Board of Regents v. Roth*, *supra*, 408 U.S. at 577. As this Court held in *Roth*, an untenured professor serving on a series of annual appointments without an entitlement to renewal founded on state law (like Upadhya) has no property interest in his position. *Id.* at 576-78. Further, as this Court said in *Perry v. Sindermann*, 408 U.S. 593, 602 n. 7 (1972), and the Seventh Circuit noted herein, concerning a claim to employment based on promises and customs of the employer, "if it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." (A. 6-7).

The law is equally established, as the Seventh Circuit noted herein, that the Fourteenth Amendment's guarantee of due process does not protect an employee's expectation of continued employment when that expectation is founded upon a mistaken understanding of state law, regardless of how reasonable that understanding is. *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976); *Smith v. Board of Education*, 708 F.2d 258, 264 (7th Cir. 1983). (A. 7).

The Seventh Circuit properly followed this Court's cautions, and applied state law to determine the scope of Upadhya's entitlements. Under state law, the Seventh Circuit concluded Upadhya's claims were only unilateral expectations, not legitimate claims of entitlement.

B. The Seventh Circuit's Decision Does Not Conflict with any Other Circuit Court of Appeals Decision

Contrary to Upadhya's contention, the Seventh Circuit's decision does not conflict with the decision of any other circuit. In the cases cited by Upadhya which address the property rights of state employees,[4] the Courts also turned to the applicable state law to determine whether there was a binding obligation sufficient to create a property interest in continued employment for the particular period of time at issue. The cases necessarily differ as each Court applied the applicable state law to the facts of the case at issue. However, the Courts' legal analyses of whether a property interest existed in those cases are all consistent with the Seventh Circuit's analysis in this case.

At a minimum, the Courts required a definite and certain promise or assurance of continued employment before due process property rights could attach. For example, in *Soni v. Board of Trustees of the University of Tennessee*, 513 F.2d 347 (6th Cir. 1975), *cert. denied*, 426 U.S. 919 (1976), the plaintiff acquired property rights through a series of express assurances to him that his employment was secure and that he would be treated as if he had tenure, even though the University acknowledged it could not formally tenure him under state law because he was an alien. *See also, Harris v. Arizona Board of Regents*, 528 F. Supp. 987, 995-96 (D. Ariz. 1981), (The property interest

[4] Cases cited by Upadhya (Upadhya's Petition for Certiorari at pp. 14-16) involving federal employees, as opposed to state employees, do not create a conflict. They are not controlling. Moreover, none are inconsistent with the relevant principles followed by the Seventh Circuit. The Court in each case looked to federal law and regulations, as opposed to state law and regulations, to determine if a legitimate claim to continued federal employment had been created by the federal agency involved.

found was based on an express written promise of automatic tenure in the third year of employment).

Where there was no promise or guarantee of continued employment, as herein, no property interest was found. For example, in *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), an untenured faculty member's claims to continued employment were insufficient to create a property interest where they were not based on a definite and certain promise or guarantee. *See also, Wright v. Cayan*, 817 F.2d 999 (2nd Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 157 (1987), (There was no property interest in continued employment where state law required a promise of employment for a specific duration to limit an employer's right to terminate, and there was no such promise).

The Courts also considered whether a promise or understanding would be enforceable under state law. For example, in *Baden v. Koch*, 638 F.2d 486 (2nd Cir. 1980), the Court held that misunderstandings of state law could not alter a New York law permitting the plaintiff's removal without a hearing. *See also, White v. Mississippi State Oil and Gas Board*, 650 F.2d 540 (5th Cir. 1981), (Even an express oral promise granting a right to continued employment was insufficient to create a property interest, because the oral promise would have been unenforceable under the state statute of frauds).

None of the cases cited by Upadhya stand for the proposition that a unilateral expectation of continued employment—not grounded in an express promise or assurance of continued employment, contrary to state law, and contrary to the terms of an express employment contract, as herein—is sufficient to create a property interest in continued employment. The Seventh Circuit's decision

herein is completely consistent with relevant decisions of other circuit Courts of Appeal.

C. The Seventh Circuit's Decision Is Consistent with Other Seventh Circuit Decisions

As the Seventh Circuit specifically noted herein, Upadhya does not come within its earlier holding in *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided court*, 466 U.S. 377 (1984). (A. 9). Contrary to Upadhya's contention, the question presented in *Vail* for this Court's review—whether an express promise which was void under state law could create an enforceable property interest in continued employment for the period promised—is not presented in this case. Unlike *Vail*, Upadhya did *not* obtain a definite and certain promise that five years would be his minimum term of employment. Also unlike *Vail*, any implication to that effect would have been unauthorized by the President and Board of Trustees of the University—the only persons who could bind the University to such contracts.

Moreover, in the face of the University's formal tenure system fully described in its *Statutes*, any reliance on a promise to that effect would be unreasonable. The Seventh Circuit in *Vail* expressly distinguished Vail's situation from that of untenured professors at the University of Illinois (like Upadhya), concluding that: "The [University of Illinois'] explicit rules governing tenure in *McElearney* suggest that any reliance to be based on a supposed entitlement . . . by virtue of the informal assurances McElearney received would be unreasonable." *Vail, supra*, 706 F.2d at 1439, n.4.

In *Vail*, the Seventh Circuit referred to its earlier rejection of the claims of former untenured assistant pro-

fessor McElearney at this same University that he had a property interest in continued employment beyond the terms of his terminal contract, claims nearly identical to Upadhya's claims herein. In *McElearney v. University of Illinois*, 612 F.2d 285, 290 (7th Cir. 1979), the Seventh Court unequivocally rejected McElearney's claims, holding:

> The Board of Trustees of the defendant university has promulgated certain university statutes pursuant to statutory authority. Ill. Rev. Stat. Ch. 144, Sections 4, 22, 28; *People ex rel. Board of Trustees of the University of Illinois v. Barrett*, 382 Ill. 321, 335, 46 N.E.2d 951 (1943) . . . Section 1b(6) of Article X provides:
>
> > An appointment for a definite term does not carry any guarantee or implication that the Board of Trustees will renew the appointment even though the appointee may have discharged his duties satisfactorily. An appointment for a definite term, if accepted, must be accepted with this stipulation.
>
> As a probationary faculty member, under section 1b(6) of Article X, plaintiff has no property interest in continued employment and no due process protections attach.

Subsequent to *Vail*, the Seventh Circuit again affirmed the dismissal of the similar due process property claim of untenured assistant professor Weinstein to continued employment at the University of Illinois beyond the term of his identical terminal contract, based on Article X, Section 1b(6) of the *Statutes*, and citing *McElearney, supra*. *Weinstein v. University of Illinois*, 628 F.Supp 862 (N.D. Ill. 1986), *aff'd*, 811 F.2d 1091 (7th Cir. 1987). The Seventh Circuit's decision herein is completely consistent with its earlier decisions addressing identical claims of untenured

assistant professors at the University of Illinois, like Upadhya.

D. The Seventh Circuit Properly Held That Upadhya Had No Legitimate Claim to Continued Employment under State Law

The Seventh Circuit correctly concluded that Upadhya's belief that he would be employed for five years was just a unilateral expectation, not a legitimate claim of entitlement under state law, because it was not backed up by a promise by the University to employ him for five years. Under Illinois law, a definite and certain promise of employment for five years is a prerequisite to a finding of an express five year contract. *Ladesic v. Servomation Corp.*, 140 Ill. App. 3d 489, 491, 488 N.E.2d 1355, 1356 (1st Dist. 1986); *Titchener v. Avery Coonley School*, 39 Ill. App. 3d 871, 350 N.E.2d 502, 507 (2d Dist. 1976). An implied contract must also be based upon a promise inferred from the expressions on the part of the promissor, here the University, which show an intention to be bound. In re *Estate of Milborn*, 122 Ill. App. 3d 688, 461 N.E.2d 1075, 1077 (3rd Dist. 1984); *Titchener, supra*, 350 N.E.2d at 507. A claim of promissory estoppel, as well, requires proof of an unambiguous promise. *Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1264 (7th Cir. 1985) (applying Illinois law); *Pudil v. Smart Buy, Inc.*, 607 F. Supp. 440, 444 (N.D. Ill. 1985).

The Seventh Circuit also correctly held that vague statements about how long Upadhya could expect to serve before a final tenure decision was made were insufficient, under state law, to translate probabilities into entitlements. Under Illinois law, statements that a benefit will accrue or an event will occur on a date certain or after

a given period of time do not constitute a guaranty that the employee will be employed through that date or period of time. *Medina v. Spotnail, Inc.*, 591 F. Supp. 190, 197 (N.D. Ill. 1984) (applying Illinois law).

The Seventh Circuit also properly held that, under Illinois law, any implication of a five year employment commitment to Upadhya was unauthorized by the President and Board of Trustees of the University, who are the only persons who could bind the University to such contracts. The University *Statutes* so provide, and they have the force of law in Illinois. *Rend Lake College Fed. of Teachers Local 3708 v. Bd. of Community College Dist. No. 521*, 84 Ill. App. 3d 308, 311, 405 N.E.2d 364, 367-68 (5th Dist. 1980) (collecting cases). The Seventh Circuit further properly concluded that, under Illinois law, those *Statutes* became a part of Upadhya's contract because Upadhya signed a document which expressly incorporated them. *Golen v. Chamberlain Manufacturing Corp.*, 139 Ill. App. 3d 53, 59, 487 N.E.2d 121, 126 (1st Dist. 1985).

The Seventh Circuit accurately concluded that Upadhya had no legitimate claim of entitlement under state law to continued employment by the University.

E. Upadhya Had No Legitimate Claim to Continued Employment under State Law for Additional Reasons the Seventh Circuit Did Not Need to Reach

The Seventh Circuit did not need to reach additional reasons why Upadhya's claim to five years of employment would be unenforceable under state law, since the record did not support a finding that a five year promise was made. However, as accurately noted by the Seventh Circuit, given the parol evidence rule, Upadhya would face hurdles relying on even an express oral promise of employment for five years because he would be using it to

vary the terms of three subsequent writings. Under Illinois law, the existence of an express written contract (Upadhya's appointment) precludes a search for an implied or quasi-contract. *International Administrators, Inc. v. Life Ins. Co. of North America*, 753 F.2d 1373, 1384 (7th Cir. 1985) (applying Illinois law); *Bachewicz v. American National Bank & Trust Co.*, 126 Ill. App. 3d 298, 466 N.E.2d 1096, 1110 (1st Dist. 1984). Further, Upadhya's and Wu's intentions or understandings are irrelevant to a determination of Upadhya's legitimate claims of entitlement because, under Illinois law, the parties' intentions and understandings must be gathered from the writings, without the assistance of parol evidence or any other extrinsic aids. *Rakowski v. Lucente*, 104 Ill. 2d 317, 472 N.E.2d 791, 794 (1984).

As the Seventh Circuit noted, it also did not have to decide whether an express promise of employment for five years by a subordinate official of the state, contrary to the *Statutes*, could have created an enforceable right to continued employment. However, under Illinois law, even if an express five year employment promise had been made to Upadhya contrary to the express provisions of the *Statutes*, it could *not* have created an enforceable obligation. Estoppel cannot be invoked against a public body based on a promise contrary to state law. *Evans v. Benjamin School District No. 25*, 134 Ill. App. 3d 875, 480 N.E.2d 1380, 1386 (2d Dist. 1985); *Anderson v. Bd. of Trustees of Community College Dist. No. 526, County of Sangamon*, 56 Ill. App. 3d 937, 372 N.E.2d 718 (4th Dist. 1978).

Agents of the University could not have made an enforceable promise contrary to the *Statutes*. Illinois law instructs that anyone entering into an agreement with the State takes the risk of accurately ascertaining that he who

acts for the state stays within the bounds of his statutory authority. *Metromedia, Inc. v. Kramer*, 152 Ill. App. 3d 459, 504 N.E.2d 884, 889-90 (1st Dist. 1987). Nor could Upadhya have *reasonably* relied on representations contrary to the express provisions of the *Statutes* even if made. *Levin v. Civil Service Comm'n*, 52 Ill.2d 516, 288 N.E.2d 97, 102 (1972); *Burnidge Bros. Almora Heights, Inc. v. Weise*, 142 Ill. App. 3d 486, 491 N.E.2d 841 (2d Dist. 1986); *see also, Vail v. Bd. of Education, supra*, 706 F.2d at 1439 n.4.

While the Seventh Circuit did not need to reach these additional reasons why Upadhya had no right to continued employment under state law, they are independent grounds which also support the Seventh Circuit's decision.

F. The Seventh Circuit Properly Held that Department Head Wu Lacked Authority to Promise Upadhya Employment for Five Years under the University's Statutes

Contrary to Plaintiff's assertions, the Seventh Circuit properly held that Department Head Wu did not have the authority under the *Statutes* to promise employment to Upadhya for more than two years. (A. 7-13). The *Statutes*, which have the force of law in Illinois, clearly provide that untenured assistant professor appointments may be for no longer than two years and limit exceptions to those expressly approved by the President or Board of Trustees. Contrary to Upadhya's suggestion, the words of the *Statutes* simply are not amenable to any other reading.[5]

[5] Contrary to Upadhya's further assertion without citation (Upadhya's Petition for Certiorari at p. 18), Respondents do not "concede" that Dr. Wu had sole discretion to initiate Upadhya's termination. He did not. Even if he did, this would be irrelevant to the issue—whether Dr. Wu was authorized to make a five year employment promise to Upadhya.

G. The Seventh Circuit Properly Held Certain Factual Findings Were Without Record Support and Were Clearly Erroneous

The Seventh Circuit properly held that, to the extent the district court found that the University promised Upadhya he would have a five year term and would not be dismissed before five years were up, its findings were clearly erroneous, citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985). (A. 8-9). The Seventh Circuit came to this conclusion only after a careful review of the writings between the parties which contradicted such a finding, and a careful review of all of the record testimony cited by Upadhya which did not support such a promise. (A. 3-5, 8-9, 12-13). Contrary to Upadhya's assertion that the Seventh Circuit reversed because it weighed the evidence differently than the district court (Upadhya Brief at p. 19), the Seventh Circuit properly concluded after careful review that there was *no* evidence in the record to support these findings. (A. 8).

H. The Seventh Circuit Properly Refused to Hold that Upadhya Could Acquire a Property Interest through Purported Department Practices

The Seventh Circuit properly refused to hold that Upadhya could acquire a property interest in five years of employment through a purported practice in one department of the University of Illinois, the institution that employed him, which would be contrary to the University's formal tenure system, contrary to state law, and contrary to the terms of his express one year appointments. As the Seventh Circuit noted, this Court in *Perry v. Sindermann, supra*, instructed that the possibility of creating a property interest in continued employment through custom and practice is dependent upon a showing sufficient to create a contractual or other claim to job tenure under state law.

(A. 6-7). But, as the Seventh Circuit concluded, state law instructs that Upadhya has no legitimate claim to continued employment for the multitude of reasons discussed above.

CONCLUSION

The Seventh Circuit's decision herein is consistent with well settled and uniform law of this Court and the Courts of Appeals. No cases are inconsistent or even suggest that a different decision should have been reached. The Seventh Circuit properly applied state law to the record facts in this case. State law provides a multitude of reasons why Upadhya's claims herein did not constitute a legitimate claim of entitlement to continued employment. There is neither conflict, confusion nor any need for clarification of the law applicable to the facts of this case. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

EXCERPTS FROM THE UNIVERSITY OF ILLINOIS STATUTES

Excerpts from Article IX, Sec. 3:

Section 3. APPOINTMENTS, RANKS, AND PROMOTIONS OF THE ACADEMIC AND ADMINISTRATIVE STAFF

a. All appointments, reappointments, and promotions of the academic staff, as defined in Art. IX, Sec. 4a, shall be made by the Board of Trustees, on the recommendation of the Chancellor concerned and the President. . . .

* * *

c. Within the academic staff as defined in Art. IX, Sec. 4a, the following academic ranks, and only these ranks, are recognized as being subject to the provisions of Art. X, Sec. 1, governing appointments for an indefinite term: professor, associate professor, assistant professor, and instructor. . . .

* * *

d. Recommendation to positions on the academic staff shall ordinarily originate with the department, or in groups not organized as departments, with the officers in charge of the work concerned, and shall be presented to the dean of the college for transmission with his recommendation to the Chancellor. Whenever the appointment or promotion of members of the academic staff is involved, the dean shall consult the chairperson or the head of the department after assuring himself that intradepartmental consultation procedures have been satisfied, or, if the college has no departments, the executive committee of the college, before making his recommendation. If the appointment involves a person who may be expected to offer courses carrying graduate credit, the dean of the college shall consult the Dean of the Graduate

College, who shall have the right to make an independent recommendation to the Chancellor, and to the President.

Excerpts from Article X, Sec. 1a:

Section 1. TENURE OF ACADEMIC STAFF

a. Except under unusual circumstances evidenced by a special written agreement approved by the President of the University and the appointee, the tenure for the academic ranks of professor, associate professor, assistant professor and instructor shall be as provided in this section. . . .

(1) An appointment as professor or associate professor shall be for an indefinite term, except that first appointments or temporary appointments may be made for shorter periods. . . .

(2) During the probationary period defined in Article X, Section 1b(1), an appointment as assistant professor shall be for not more than two years, . . .

Excerpts from Article X, Sec. 1b:

b. Upon the completion of a probationary period as hereafter defined, any reappointment of an assistant professor or an instructor shall be for an indefinite term, subject to the following:

(1) An appointee receiving his or her first contract at this University as assistant professor or instructor enters a probationary period of seven academic years of service. Prior academic service at other academic (or equivalent) institutions may be credited up to a maximum of three years toward the fulfillment of the probationary period. The amount of any such credit may be negotiated as may other terms of the appointment and shall be stated in the first appointment contract,

as provided for all contracts for definite terms in sub-paragraph 1b(5) below.

* * *

(3) An appointee for a definite term shall be given, no later than August 31 at the Chicago campus and August 20 at the Urbana-Champaign campus in the sixth year of the probationary period, either (a) written notice that at the expiration of the probationary period, he or she will be offered an appointment for an indefinite term, or (b) written notice of non-reappointment.

(4) At any time except during the last year of the probationary period, an instructor or assistant professor on a definite-term appointment may be given written notice of non-reappointment. Except in the case of an instructor or assistant professor who is in the first year of academic service at this University, (a) written notice of non-reappointment shall be given not less than twelve months before the expiration of his appointment; or (b) written notice of non-reappointment, if given less than twelve months before the expiration of the appointment, shall be accompanied by an offer from the Board of Trustees of a terminal contract for one additional year of academic service. In the case of an instructor or assistant professor on a definite-term appointment who is in the first year of academic service at this University, written notice of non-reappointment shall be given not later than March 1, and need not be accompanied by an offer of a terminal contract; if written notice of non-reappointment is given after March 1, it shall be accompanied by an offer from the Board of Trustees of a terminal contract for one additional year of service.

(5) The total amount of credit toward completion of the probationary period, including both

credit for service at other institutions and credit for prior service at this University, shall be stated in every contract for academic services for a definite term. . . .

(6) An appointment for a definite term does not carry any guarantee or implication that the Board of Trustees will renew the appointment even though the appointee may have discharged his duties satisfactorily. An appointment for a definite term, if accepted, must be accepted with this stipulation.
